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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD OLIVIER,
Plaintiff,

v.

NDEX WEST, LLC; AMERICA'S HOME
SERVICING COMPANY, and Does 1-50
inclusive,

Defendant.

1:09-CV-00099 OWW GSA

ORDER RE DEFENDANT'S MOTION TO
DISMISS OR IN THE ALTERNATIVE
FOR MORE DEFINITE STATEMENT; AND
MOTION TO EXPUNGE *LIS PENDENS*
(DOCS. 7 & 8).

I. INTRODUCTION

Before the court for decision is Defendant Wells Fargo Home Mortgage's motion to dismiss, or in the alternative for a more definite statement, and motion to expunge *lis pendens*. Docs. 7 & 8. At the time the complaint in this case was filed, Plaintiff was represented by Mitchell W. Roth of the law firm of M.W. Roth, PLC. That law firm has ceased operations, and the California Superior Court for the County of Los Angeles has assumed jurisdiction over Roth's practice. See Doc. 15.

A hearing on the pending motions was originally set for April 13, 2009, at which time Plaintiff appeared and expressed his desire to obtain new counsel. To permit Plaintiff a fair opportunity to secure new counsel, the hearing was continued to July 20, 2009. Doc. 19. Due to the unavailability of the court, the hearing was again continued to August 10, 2009. Counsel has

1 yet to file a notice of appearance on behalf of Plaintiff, nor
2 has Plaintiff filed any opposition to the pending motions.

3
4 II. BACKGROUND

5 On December 12, 2008, Plaintiff filed suit against NDEX
6 West, LLC ("NDEX"),¹ America's Home Servicing Company, and Does
7 1-50, inclusive. See Doc. 2, Ex. A (Complaint). Plaintiff seeks
8 monetary damages and to enjoin foreclosure of real property
9 located at 1155 Sorrel Avenue, Lemoore, California 93245. *Id.* at
10 7. The Complaint, originally filed in the California Superior
11 Court for the County of Kings, Hanford Division, was removed by
12 Wells Fargo Bank, N.A., erroneously sued as America's Home
13 Servicing Company, pursuant to 28 U.S.C. § 1441(b) (permitting
14 removal of any civil action founded on a claim or right arising
15 under the "laws of the United States"), because Plaintiff
16 asserted claims against the bank arising under various federal
17 statutes. *Id.* at 2 (notice of removal).

18 The Complaint contains allegations that have been asserted
19 against Defendant in numerous other lawsuits. *Id.* Plaintiff
20 alleges that Defendant improperly commenced a non-judicial
21 foreclosure against residential property owned by Plaintiff, *id.*
22 at ¶8, in part because America's Home Servicing Company may not
23 possess the original endorsed note, *id.* at ¶7. In the
24 alternative, the Complaint alleges that Defendants "added costs
25 and charges to the payoff amount of the note that were not
26 justified and proper under the terms of the note or the law."

27 ¹ NDEX, which has not appeared in this or other cases, serves
28 as an agent to initiate the foreclosure process. See *Ramos v.*
NDEX West, LLC, 2009 WL 1675911, at *1 (E.D. Cal. June 1, 2009).

1 *Id.* at ¶17.

2 The Complaint asserts three causes of action. First, under
3 a claim entitled "Unfair Debt Collection Practices," Plaintiff
4 alleges that Defendant violated California's Rosenthal Fair Debt
5 Collections Practices Act ("R-FDCPA"), California Civil Code §
6 1788(e)-(f), the federal Fair Debt Collections Practices Act
7 ("FDCPA"), 15 U.S.C. § 1692, *et seq.*; and the Real Estate
8 Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601-2617. *Id.*
9 at ¶¶ 19-21. Second, in a claim entitled "Predatory Lending
10 Practices," it is alleged that Defendant violated the Home
11 Ownership and Equity Protection Act ("HOEPA"), 15 U.S.C. § 1637;
12 the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*;
13 "Reg Z," 12 C.F.R. § 226, *et seq.*; and the Federal Trade
14 Commission Act ("FTCA"), 15 U.S.C. §§ 41-58. *Id.* at ¶¶ 22-25.
15 Finally, it is alleged that Defendant violated the Racketeer
16 Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§
17 1961, *et seq.*, through attempts to collect unlawful debts, mail
18 fraud, and prohibited interference with commerce, robbery, or
19 extortion as defined under 18 U.S.C. § 1951. *Id.* at ¶¶ 26-30.

20 Plaintiff does not specify which sections of these various
21 laws he contends were violated, nor does he describe the conduct
22 that allegedly caused the violations.

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III. STANDARD OF DECISION

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In deciding whether to grant a motion to dismiss, the court
"accept[s] all factual allegations of the complaint as true and
draw[s] all reasonable inferences" in the light most favorable to
the nonmoving party. *Rodriguez v. Panayiotou*, 314 F.3d 979, 983

1 (9th Cir. 2002). A motion to dismiss brought under Federal Rule
2 of Civil Procedure 12(b)(6) "tests the legal sufficiency of a
3 claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To
4 survive a motion to dismiss, a complaint must "contain sufficient
5 factual matter, accepted as true, to 'state a claim to relief
6 that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct.
7 1937, 1949 (May 18, 2009) (quoting *Bell Atl. Corp v. Twombly*, 550
8 U.S. 544, 570 (2007)).

9 A claim has facial plausibility when the plaintiff
10 pleads factual content that allows the court to draw
11 the reasonable inference that the defendant is liable
12 for the misconduct alleged. The plausibility standard
13 is not akin to a "probability requirement," but it asks
14 for more than a sheer possibility that defendant has
acted unlawfully. Where a complaint pleads facts that
are "merely consistent with" a defendant's liability,
it "stops short of the line between possibility and
plausibility of 'entitlement to relief.'"

15 *Id.* (citing *Twombly*, 550 U.S. 556-57). Dismissal also can be
16 based on the lack of a cognizable legal theory. *Balistreri v.*
17 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

18 .
19 IV. DISCUSSION

20 A. Possession of the Original Note is Not a Prerequisite to
21 Foreclosure.

22 Plaintiff cites Uniform Commercial Code §§ 3-301 and 3-309
23 for the proposition that in order to enforce a note, one must be
24 in possession of that note. Compl. at ¶17. Those provisions of
25 the UCC pertain to negotiable instruments, not non-judicial
26 foreclosure under deeds of trust, which is governed by California
27 Civil Code section 2924, *et seq.* Section 2924(a)(1) provides
28 that a "trustee, mortgagee or beneficiary or any of their

1 authorized agents" may conduct the foreclosure process. Cal.
2 Civ. Code § 2924(a)(1). California courts have held that the
3 Civil Code Provisions "cover every aspect" of the foreclosure
4 process, *I.E. Assocs. v Safeco Title Ins. Co.*, 39 Cal. 3d 281,
5 285 (1985), and are "intended to be exhaustive," *Moeller v. Lien*,
6 25 Cal. App. 4th 822, 834 (1994). There is no requirement that
7 the party initiating foreclosure be in possession of the original
8 note and courts have repeatedly held that possession of the
9 original note is not a prerequisite to foreclosure. *See, e.g.*,
10 *Candelo v. NDEX West, LLC*, 2008 WL 5382259, at *4 (E.D. Cal. Dec.
11 23, 2008) ("No Requirement exists under statutory framework to
12 produce the original note to initiate non-judicial
13 foreclosure."); *Putkkuri v. ReconTrust Co.*, 2009 WL 32567, at *2
14 (S.D. Cal. Jan 5, 2009) ("Production of the original note is not
15 required to proceed with a non-judicial foreclosure."). This
16 claim is meritless and is DISMISSED WITH PREJUDICE.

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18 B. Unfair Debt Collection Practices Claim.

19 Plaintiff's first cause of action purports to assert claims
20 for violations of the FDCPA, R-FDCPA, and RESPA. Plaintiff
21 alleges that the "actions aforementioned," which include the
22 initiation of foreclosure without possession of the original note
23 and the addition of costs and charges to the payoff amount of the
24 note that were not justified and proper under the terms of the
25 note, constitute violations of these laws.

26 First, FDCPA regulates only "debt collectors". See 15
27 U.S.C. §§ 1692(e)-(f). "Debt collector" is defined as "any
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1 person who uses any instrumentality of interstate commerce or the
2 mails in any business the principal purpose of which is the
3 collection of any debts, or who regularly collects or attempts to
4 collect, directly or indirectly, debts owed or due or asserted to
5 be owed or due another." § 1692a(6). "Debt Collector" does not
6 include persons who collect debt "to the extent such activity ...
7 (ii) concerns a debt which was originated by such person; [or]
8 (iii) concerns a debt which was not in default at the time it was
9 obtained by such person...." § 1692a(6)(F). Nothing in the
10 complaint suggests that U.S. Bank, which is the current
11 beneficiary of Plaintiff's note and deed of trust, is not a "debt
12 collector," nor has Plaintiff sued any debt collector.
13 Therefore, the FDCPA is not triggered by Plaintiff's allegations.

14 The absence of a violation of FDCPA results in failure of
15 Plaintiff's California R-FDCPA claim, as the scope of
16 California's law mirrors the federal statute. See Cal. Civil
17 Code, § 1788, *et seq.* Moreover, California Civil Code 2924(b)
18 exempts the trustees' acts of recording and servicing the
19 required notice of default and notice of sale from R-FDCPA's
20 scope.

21 Plaintiff's RESPA claim is likewise unfounded. RESPA
22 primarily regulates charges and disclosures at or before the
23 closing of a real estate sale or loan transaction. It contains
24 no private right of action regarding these disclosure
25 requirements. See *Bloom v. Martin*, 865 F. Supp. 1377, 1384-1385
26 (N.D. Cal. 1994), *aff'd*, 77 F.3d 318 (1996). RESPA does contain
27 some provisions governing mortgage loan servicers, e.g., 12
28 U.S.C. § 2605(a)-(d) (forbidding imposition of late fees on

1 payments made within 60 days of a loan's transfer to a new
2 servicer), and § 2605(e)(requiring servicer respond to "qualified
3 written requests" to correct a loan account or provide
4 information). Although Plaintiff alleges his attorney sent a
5 letter to NDEX demanding a detailed accounting of all charges
6 constituting the pay off demand for the note, this was sent to
7 the foreclosure agent (NDEX), not the loan servicer. The
8 complaint does not allege any claims under RESPA.

9 Defendant's motion to dismiss the FDCPA, R-FDCPA, and RESPA
10 claims is GRANTED WITHOUT LEAVE TO AMEND.

11
12 C. Predatory Lending Practices Claim.

13 Plaintiff's second cause of action alleges that Defendants
14 violated HOEPA, TILA, Reg Z, and FTCA. *Id.* at ¶¶ 22-25.

15 There are two types of damages available under HOEPA and
16 TILA: statutory damages and rescission. 15 U.S.C. §§ 1635(f),
17 1640(a). The statute of limitations for bringing a claim for
18 statutory damages is one year from the date of the occurrence of
19 the violation. § 1640(e); *Fonua v. First Allied Funding*, No. C
20 09-497 SI, 2009 U.S. Dist. LEXIS 30195, at *11 (N.D. Cal. Mar.
21 27, 2009) (acknowledging that "[c]laims under HOEPA are governed
22 by TILA's one year statute of limitations"). Here, Plaintiff
23 entered into the challenged loan transaction on October 25, 2006.
24 There is no allegation in the complaint suggesting that any
25 HOEPA/TILA violation would have accrued on a later date.
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27 Therefore, the statute of limitations for any statutory damages
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1 claim expired on October 25, 2007. Plaintiff did not file this
2 lawsuit until December 12, 2009, more than two years later. Any
3 damages claims under HOEPA or TILA are barred

4 In addition to damages, rescission may be available under
5 HOEPA and TILA in some circumstances. 15 U.S.C. § 1635; 12
6 C.F.R. § 226.23. To the extent rescission may apply here, any
7 such claim is also time-barred. The consumer's right to
8 rescission is absolute only for a period of three days after the
9 loan is consummated, 15 U.S.C. § 1635(a); 12 C.F.R. §
10 226.23(a)(3), unless the lender fails to provide "material
11 disclosures" at the closing, in which case the period is extended
12 to three years, 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3)
13 There are no allegations in the complaint that the lender failed
14 to make "material disclosures." Therefore, the three-day
15 limitations period applies. As Plaintiff did not initiate this
16 lawsuit within that time period, any rescission action is time
17 barred.

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20 Reg Z, 12 C.F.R. § 226.4(c)(2), interprets TILA by defining
21 terms such as "finance charge." Claims brought under Reg Z are
22 subject to TILA's statute of limitations. *See, e.g., Diessner v.*
23 *Mortgage Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 11990-91
24 (2009). Therefore, Plaintiff's Reg Z claims are also time-
25 barred.

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27 Finally, Plaintiff's FTCA claim fails because there is no
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1 private right of action under that statute. "[P]rotection
2 against unfair trade practices afforded by the [FTCA] vests
3 initial remedial power solely in the Federal Trade Commission."
4 *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973).

5 Defendant's motion to dismiss the TILA, HOEPA, Reg Z, and
6 FTCA claims is GRANTED WITHOUT LEAVE TO AMEND.
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9 D. RICO Claim

10 Finally, the third cause of action alleges that Defendant
11 violated RICO, 18 U.S.C. §§ 1961, *et seq.*, through attempts to
12 collect unlawful debts, mail fraud, and prohibited interference
13 with commerce, robbery, or extortion as defined under 18 U.S.C. §
14 1951. Compl. at ¶¶ 26-30.

15 Subsection (c) of 18 U.S.C. § 1962 provides:

16
17 It shall be unlawful for any person employed by or
18 associated with any enterprise engaged in, or the
19 activities of which affect, interstate or foreign
20 commerce, to conduct or participate, directly or
indirectly, in the conduct of such enterprise's affairs
through a pattern of racketeering activity or
collection of unlawful debt.

21 "A violation of § 1962(c) "requires (1) conduct (2) of an
22 enterprise (3) through a pattern (4) of racketeering activity.
23 The plaintiff must, of course, allege each of these elements to
24 state a claim." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496
25 (1985). "Racketeering activity" is any act indictable under
26 several provisions of Title 18 of the United States Code,
27 *Rothman v. Vetter Park Mgmt.*, 912 F.2d 315, 316 (9th Cir.1990),
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1 and includes "any act or threat involving murder, kidnapping,
2 gambling, arson, robbery, bribery, extortion, dealing in obscene
3 matter, or dealing in a controlled substance or listed chemical
4 (as defined in section 102 of the Controlled Substances Act),
5 which is chargeable under State law and punishable by
6 imprisonment for more than one year," 18 U.S .C. § 1961(1)(A).

7 Subsection (5) of 18 U.S.C. § 1961 defines "pattern of
8 racketeering activity" to require "at least two acts of
9 racketeering activity, one of which occurred after the effective
10 date of this chapter and the last of which occurred within ten
11 years (excluding any period of imprisonment) after the commission
12 of a prior act of racketeering activity." Section 1961 "does not
13 so much define a pattern of racketeering activity as state a
14 minimum necessary condition for the existence of such a pattern."
15 *H.J., Inc. v. N.W. Bell Tele. Co.*, 492 U.S. 229, 237 (1989).

16 "Section 1961(5) concerns only the minimum number of
17 predicates necessary to establish a pattern; and it assumes that
18 there is something to a RICO pattern beyond simply the number of
19 predicate acts involved." *H.J., Inc.*, 492 U.S. at 238. A
20 pattern is not formed by "sporadic activity." *Id.* at 239. The
21 term pattern requires a relationship between predicates and the
22 threat of continuing activity. *Id.* at 238. The factors of
23 "continuity plus relationship [] combine[] to produce a pattern."
24 *Id.* at 239.

25 Fraud claims brought under RICO are subject to the
26 particularity and specificity requirements of Federal Rule of
27 Civil Procedure 9(b). *Schreiber Distrib. Co. v. Serv-Well*
28 *Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986). Here, among other

1 things, Plaintiff fails to allege any nexus between Wells Fargo
2 and the commission of two or more acts constituting a pattern of
3 racketeering activity. Plaintiff has, in fact, utterly failed to
4 allege the commission of two or more predicate acts by any named
5 party or third party. Any such allegations must be specific as
6 to time, place, and nature. *H.J. Inc.*, 492 U.S. at 241.

7 Defendant's motion to dismiss the RICO claim is GRANTED.

8
9 E. Motion to Expunge the *Lis Pendens*.

10 A *lis pendens* is a recorded instrument that provides
11 constructive notice of a pending lawsuit affecting title to
12 certain real property and that ensures that any person who
13 attempts to buy that property takes it subject to any judgment
14 that may be entered. *Bishop Creek Lodge v. Scira*, 46 Cal. App.
15 4th 1721, 1733 (1996). The practical effect of a *lis pendens* is
16 to "cloud title" to the property and prevent its transfer until
17 the *lis pendens* is expunged. *Id.*

18 Because of the potentially serious effects to the
19 transferability of property, a *lis pendens* must be expunged if a
20 plaintiff cannot establish the "probable validity" of its claim
21 by a "preponderance of the evidence." Cal. Code Civ. Pro.
22 ("CCP") § 405.32. "[T]he court shall order that the notice [of
23 *lis pendens*] be expunged if the court finds that the claimant has
24 not established by a preponderance of the evidence the probable
25 validity of the real property claim." *Id.* The party opposing
26 the motion to expunge has the burden of proving the "probable
27 validity." CCP § 405.30. A claim has "probable validity" where
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1 "it is more likely than not that the plaintiff will obtain
2 judgment against the defendant on the claim." CCP at § 405.3.
3 The reviewing court is required to consider the relative merits
4 of the parties' positions and must decide whether plaintiff has
5 met his burden of establishing the probable validity of his
6 claims by a preponderance of the evidence. *Loeb & Loeb v.*
7 *Beverly Glen Music, Inc.*, 166 Cal. App. 3d 1110, 1120 (1985).
8 Here, where Plaintiff's complaint fails to state any claim upon
9 which relief may be granted, Plaintiff cannot establish the
10 probable validity of those claims. Defendant's request for
11 expungement of the *lis pendens* is GRANTED.

12 Under CCP § 405.38, when a court orders a *lis pendens*
13 expunged, the order must direct that the prevailing party be
14 awarded reasonable attorneys' fees and costs. This award is
15 mandatory, unless the Court finds that the opposing party acted
16 with substantial justification, or that other circumstances make
17 the imposition of attorneys' fees unjust. *Id.* Defendant
18 requests attorneys' fees in this case. However, given that the
19 law firm involved in the serial filing of this and numerous
20 related lawsuits is no longer in operation, imposing fees upon a
21 probably uninformed Plaintiff already in financial distress would
22 be unjust. Defendant's request for attorneys' fees is DENIED.

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V. CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss for failure to state a claim is GRANTED and the *lis pendens* is EXPUNGED. Plaintiff has not requested leave to amend. Defendant's request for attorney's fees is DENIED.

SO ORDERED

DATED: August 10, 2009

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Judge.